STATE OF MICHIGAN

COURT OF APPEALS

In re JOHN W. SIMPSON TRUST.

J. CHRIS SIMPSON,

Appellant,

v

HUNTINGTON BANK, Trustee, and DEBORAH SIMPSON, Personal Representative of the Estate of D. BRUCE SIMPSON, Deceased,

Appellees.

UNPUBLISHED
July 26, 2011

No. 297243
Grand Traverse Probate Court
LC No. 09-030352-TV

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Appellant,

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Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Appellant Chris Simpson (Chris) appeals by right the probate court's declaratory judgment entered in each of these consolidated cases declaring that an option agreement executed by John Simpson in 1988 was valid and enforceable. We affirm.

At issue is an option agreement that John Simpson (John) executed in June 1988, granting to his son, D. Bruce Simpson (Bruce), the right to purchase various parcels of real property in Leelanau County that were held initially by John's revocable trust and later by his wife Mildred Simpson's (Mildred) revocable trust. The 1988 option agreement provided that Bruce could exercise the option at any time on or before 20 years from the date of the agreement. When some of the properties were transferred to Mildred's trust in 1993, Bruce executed a waiver of the option only to facilitate the transfer of the properties for estate planning purposes, and Mildred executed a written agreement ratifying and incorporating John's 1988 option agreement. John died in 2002, and Mildred died in 2006. The properties were thereafter administered by John's and Mildred's trusts. In April 2008, Bruce exercised the option with respect to several of the parcels. Bruce then died in March 2009. In April 2009, the personal representative of Bruce's estate completed the purchase of the properties by entering into land contracts and conveying a promissory note in the amount of the required down payment.

Chris, who is John's other surviving son, later filed a petition in the probate court with respect to John's and Mildred's trusts, in which he challenged the validity of the 1988 option agreement. The probate court rejected each of Chris's challenges to the validity of the option agreement and issued declaratory judgments declaring the original 1988 agreement valid and enforceable.

A trial court's ruling in a declaratory judgment action is reviewed de novo on appeal. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10; 743 NW2d 902 (2008). The probate court's findings of fact are reviewed for clear error. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003).

As an initial matter, we agree with appellees that, regardless of the validity of the 1988 option agreement, Chris is not entitled to any relief in light of the completed sale of the properties to Bruce's estate in 2009.

An option consists of two distinct elements, including "'the offer to sell, which does not become a contract until accepted; and the completed contract to leave the offer open for a specified time.'" *Bil-Gel Co v Thoma*, 345 Mich 698, 708; 77 NW2d 89 (1956) (citation omitted). As explained in *Oshtemo Twp v Kalamazoo*, 77 Mich App 33, 37; 257 NW2d 260 (1977):

> An option is a preliminary contract for the privilege of purchase and not itself a contract of purchase. An option is basically an agreement by which the owner of the property agrees with another that he shall have a right to buy the property at a fixed price within a specified time. An option is, in effect, only an offer which requires strict compliance with the terms of the option both as to the exact thing offered and within the time specified. Failure to so comply results in loss of the rights under the option. [Citations omitted.]

The holder of the option to purchase land does not acquire any actual rights in the property itself until the option is exercised. *Id.* at 38-39.

"As a general rule, an option contract is strictly construed and the time for performance is of the essence." *Bowkus v Lange*, 196 Mich App 455, 459; 494 NW2d 461 (1992), rev'd on other grounds 441 Mich 930 (1993). If an option is accepted on the terms proposed and in strict compliance with the time limitations, it ripens into a binding bilateral contract of purchase. *LeBaron Homes, Inc v Pontiac Housing Fund, Inc*, 319 Mich 310, 315; 29 NW2d 704 (1947).

Even if the 1988 option agreement never became a binding agreement, it reverted to an open offer from John to sell the property to Bruce. In *Eastern Mich Univ Bd of Control v Burgess*, 45 Mich App 183, 186; 206 NW2d 256 (1973), this Court held that "[t]hat which purports to be an option for the purchase of land, but which is not based on valid consideration, is a simple offer to sell the same land." The failure of consideration for an option only affects the collateral agreement to keep the offer open, not the underlying offer. And when an offer is accepted before it has been revoked, it is binding on the parties. *Id*. at 186-188. In other words, even if the original option agreement were somehow invalid, Bruce accepted the open offer to purchase the properties before the offer was revoked, thereby creating a valid contract for the sale of the properties. *Id*. Accordingly, Chris is not entitled to relief regardless of the validity of the original option agreement.

Nonetheless, we find no merit to Chris's argument that there was insufficient consideration to support the original option agreement. In *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002), our Supreme Court explained:

> To have consideration there must be a bargained-for exchange. There must be "'a benefit on one side, or a detriment suffered, or a service done on the other.'" Courts do not generally inquire into the sufficiency of consideration. It has been said "[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration." [Citations omitted.]

In *Sulzberger v Steinhauer*, 235 Mich 253, 257; 209 NW 68 (1926), this Court addressed the consideration necessary to support an option contract:

> There is no merit in the point that the consideration was inadequate. Consideration for an option may be nominal. The consideration for the sale, in the event of acceptance, is entirely apart from the consideration for the option, and such consideration must be specified. It was specified, was certain in amount at $1,500 per acre of land, and such price was adequate.
>
> We think the tender of one dollar, together with recital of its payment, stated in the option over the signatures of defendants, estops them from disputing such payment for the purpose of destroying the effect and operation of their option.

The option agreement in this case expressly stated that it was made "[i]n consideration for the mutual promises made in this agreement." Although the agreement did not specify the nature of the mutual promises, appellee Deborah Simpson submitted an affidavit from Larry Nelson, the attorney who drafted the option agreement for John in 1988. Nelson averred that he understood

> through conversations with John W. Simpson that the Option To Purchase was being given to his son, D. Bruce Simpson, to enable him to continue the family business. His other son, Christopher Simpson, had left the area. He also took into consideration the lease D. Bruce Simpson had entered into for the Harbor Hill Fruit Farms, Inc. property, which provided income to John W. Simpson and his wife, Mildred[.]

Chris argues that Nelson's affidavit cannot be considered because it is improper parol evidence and also contains inadmissible hearsay.

"Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *Vergote v K Mart Corp (After Remand)*, 158 Mich App 96, 108; 404 NW2d 711 (1987). However,

> a written acknowledgement of receipt of consideration or other form of payment in a contract merely creates a rebuttable presumption that consideration has, in fact, passed. Neither the parol evidence rule nor the doctrine of estoppel bars the presentation of evidence to contradict any such acknowledgement. [*Claire-Ann Co v Christenson & Christenson, Inc*, 223 Mich App 25, 32; 566 NW2d 4 (1997).]

Here, the option agreement indicated on its face that there was "consideration for the mutual promises made in this agreement." Chris did not offer any evidence to contradict the acknowledgement that consideration had passed between the parties. When a contract recites consideration, the burden of proving a lack or failure of consideration is on the party challenging the agreement. *Gross v Von Dolcke*, 313 Mich 132, 136; 20 NW2d 838 (1945); *In re McLaughlin's Estate*, 182 Mich 707, 716; 151 NW 745 (1915). It was not necessary for the probate court to even consider Nelson's affidavit, because Chris did not rebut the presumption of valid consideration. Indeed, the probate court stated that it did not consider Nelson's affidavit in deciding the matter.

We also find no merit to Chris's argument that consideration was lacking because any consideration in the form of Bruce's promise to continue to work on the family farm was illusory. Chris argues that Bruce had previously agreed to work on the farm, and thus had a preexisting duty to do so. He therefore argues that Bruce's promise could not serve as valid consideration for the option agreement. It is true that, "[u]nder the preexisting duty rule, it is well settled that doing what one is legally bound to do is not consideration for a new promise." *Yerkovich v AAA*, 461 Mich 732, 740-741; 610 NW2d 542 (2000), see also *Puett v Walker*, 332 Mich 117, 122; 50 NW2d 740 (1952). But as noted previously, when a contract recites consideration, the burden of proving a lack or failure of consideration is on the party challenging the agreement. *In re McLaughlin's Estate*, 182 Mich at 716. In this case, Chris failed to offer any evidentiary support for his claim that the consideration recited in the agreement was illusory because Bruce had a preexisting legal obligation to work on the farm. Therefore, the probate court did not err in rejecting this challenge to the validity of the option agreement.

Chris additionally argues that Bruce's estate did not strictly comply with the terms of the option agreement because the agreement required a down payment of ten percent of the purchase price, but Bruce's estate executed a promissory note to satisfy this requirement instead of paying ten percent in cash. However, the option agreement did not require that the down payment be in cash. Cf. *Catsman v Eister*, 8 Mich App 563, 567; 155 NW2d 203 (1967). Moreover, we note that the Michigan Reports are replete with cases in which a promissory note was accepted as a down payment on a land contract. See, e.g., *Easley v Mortensen*, 370 Mich 115, 117; 121 NW2d 420 (1963); *Wheeler v Martin*, 364 Mich 41, 44; 110 NW2d 635 (1961); *Cross v Wagenmaker*, 329 Mich 100, 102; 44 NW2d 888 (1950). Indeed, the general rule in Michigan is that a promissory note constitutes good payment as a matter of law if it is so understood by the parties. *Lent v Dickinson*, 331 Mich 257, 264; 49 NW2d 167 (1951); *Gardner v Gorham*, 1 Doug 507, 510 (1844). In this case, Huntington Bank, as co-trustee of John's and Mildred's trusts, clearly accepted the promissory note from Bruce's estate in satisfaction of the ten-percent down payment required by the option agreement. Consequently, we find Chris's argument in this regard to be without merit.

Chris further argues that John never intended the original option to run with the land and that Mildred's trust was accordingly not obligated to honor the original option agreement when some of the properties were transferred to it in 1993. He also suggests that the 1993 agreement executed by John, Mildred, and Bruce effectively preempted and replaced the original 1988 option agreement, creating a new option that was valid only from that date forward. We find no merit to these arguments. "An option to sell real estate given by the owner of the property is an obligation that runs with the land and may be exercised by the optionee, even against subsequent purchasers, so long as those purchasers are not bona fide purchasers for value." 1 Cameron, Michigan Real Property Law, (3d ed), § 15.47, p 555; see also *Nu-Way Service Stations, Inc v Vandenberg Bros Oil Co*, 283 Mich 551; 278 NW 683 (1938).

It is true that "'[t]here is a strong tendency to construe an option . . . to be limited to the lives of the parties, unless there is clear evidence of a contrary intent.'" *Waterstradt v Snyder*, 37 Mich App 400, 403; 194 NW2d 389 (1971), quoting *Old Mission Peninsula Sch Dist v French*, 362 Mich 546, 551; 107 NW 758 (1961). In this case, however, the original option agreement specifically provided that the option to purchase was to last for a period of 20 years and that it was for the benefit of Bruce and his "heirs and assigns." Further, when some of the properties were transferred from John's trust to Mildred's trust in 1993, John, Mildred, and Bruce executed an agreement whereby all parties agreed that Mildred's trust would become obligated and bound by the terms of the original option to purchase. Lastly, we note that John signed the original option agreement in his capacity as trustee of the John W. Simpson Revocable Living Trust—not in his individual capacity. John was undoubtedly aware that his trust would continue in existence beyond his own death. See MCL 700.7814(2)(c).

In short, there is no indication that John intended to limit the option to his lifetime only. On the contrary, the evidence clearly demonstrates that the properties were placed in John's and Mildred's trusts for estate planning purposes, and that the parties intended for the original option to run with the land and to continue for a term of 20 years, even after John's and Mildred's deaths. Nor do we perceive any evidence that the 1993 agreement superseded or replaced the original 1988 agreement. Indeed, the 1993 agreement specifically incorporated the original 1988 option by reference, stated that Mildred's trust "will become obligated and bound by the terms of

[the original 1988] Option to Purchase Agreement as to the parcels transferred to the Mildred L. Simpson Revocable Living Trust," and provided that "all the terms and conditions, rights and obligations set forth in the [original 1988] Option to Purchase shall continue to be binding upon all parties . . . with respect to the parcels owned by the Trusts[.]" It is clear from the record that the original 1988 option agreement continued in force even after certain of the properties were transferred to Mildred's trust in 1993, and even after John's and Mildred's deaths.

Chris also contends that the option was invalid because John never intended to be bound by it, given that he reserved the right to sell certain nonagricultural properties and in fact sold some of these parcels before the option was exercised. We disagree. The terms of the original 1988 option agreement specifically provided that if John sold any of the nonagricultural parcels before the option was exercised, the price owed by Bruce for the purchase of the remaining parcels would be adjusted downward. We perceive no evidence to suggest that John did not intend to be bound by the terms of the option agreement merely because he reserved the right to sell certain nonagricultural properties before the option was exercised.

The probate court did not clearly err in its factual findings and properly declared that the original 1988 option agreement was valid and enforceable. Accordingly, Chris is not entitled to set aside the sale of the property to Bruce's estate.

Affirmed. As the prevailing parties, appellees may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Pat M. Donofrio